STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM COURT OF APPEALS

IN RE PETITION BY TREASURER OF
WAYNE COUNTY FOR FORECLOSURE

Supreme Court No. 129341

Court of Appeals No. 261074

Wayne County Circuit Court
No. 02-220192 PZ

WAYNE COUNTY TREASURER,

Petitioner,

and

MATTHEW TATARIAN and MICHAEL KELLY,

Intervening Parties-Appellants,

v

PERFECTING CHURCH,

Respondent-Appellee.
/

AMICUS BRIEF OF CITY OF DETROIT

IN SUPPORT OF APPELLEE

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

On July 7, 2004, the Wayne County Circuit Court granted Appellee Perfecting Church relief from a judgment of property tax foreclosure under MCR 2.612. On February 23, 2005, Appellants Matthew Tatarian and Michael Kelly filed a delayed application for leave to appeal from that order to the Michigan Court of Appeals. The Court of Appeals had subject matter jurisdiction pursuant to MCR 7.203(B)(1). On July 11, 2005, the Court of Appeals denied the application for lack of merit in the grounds presented.

On August 22, 2005, Appellants Matthew Tatarian and Michael Kelly filed an application for leave to appeal to the Michigan Supreme Court. The Supreme Court has subject matter jurisdiction pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

MCL 211.78l, AS ENACTED IN 1999 PA 123, PROVIDES AS FOLLOWS:

> If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.
> (2) The court of claims has original and exclusive jurisdiction in any action to recover monetary damages under this section.
> (3) An action to recover monetary damages under this section shall not be brought more than 2 years after a judgment for foreclosure is entered under section 78k.
> (4) Any monetary damages recoverable under this section shall be determined as of the date a judgment for foreclosure is entered under section 78k and shall not exceed the fair market value of the property on that date.

I. WHETHER MCL 211.78l PERMITS A PERSON TO BE DEPRIVED OF PROPERTY WITHOUT BEING AFFORDED DUE PROCESS?

The Amicus City of Detroit answers, "Yes."

II. WHETHER A CIRCUIT COURT THAT ENTERED A FORECLOSURE JUDGMENT RETAINS JURISDICTION TO GRANT RELIEF FROM ITS JUDGMENT OF FORECLOSURE PURSUANT TO MCR. 2.612(C), NOTWITHSTANDING THE PROVISIONS OF MCL 211.78l (1) AND (2)?

The Amicus City of Detroit answers, "Yes."

INTEREST OF AMICUS CITY OF DETROIT

The amicus City of Detroit has two distinct interests in this case. First, the City of Detroit is a municipal taxing entity which is now statutorily required to have the Wayne County Treasurer collect delinquent Detroit real property taxes. The City of Detroit has a direct and compelling interest in having its own delinquent real property taxes foreclosed in a manner that comports with the basic procedural due process rights of Detroit citizens.

Second, the City of Detroit is a payer of Wayne County real property taxes because it owns and leases numerous parcels of land in Wayne County. It therefore enjoys the same due process guarantees enjoyed by all property owners in real property tax foreclosures. Much like the case at bar, Wayne County Circuit Court Chief Judge Mary Beth Kelly determined that the Wayne County Treasurer had deprived the City of Detroit of its real property interest in a publicly owned parking garage on March 4, 2002, without affording the City the predeprivation notice and hearing required by the Due Process Clause in property tax foreclosures, and set aside the judgment of tax foreclosure as to the City and subsequent auction sale. The City's case is pending before this Court, which ordered the case held in abeyance on March 27, 2006, pending this Court's resolution of the case at bar. (Detroit Building Authority et al v Wayne County Treasurer et al, Supreme Court Docket Nos. 129741, 129743, 129745).

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The Appellee Perfecting Church owned the subject surface parking lot at 17843 Van Dyke in Detroit. The lot adjoined the large church building. The Church's single deed to the lot at 17843 Van Dyke and the land at 17833 Van Dyke was recorded in the Wayne County Register of Deeds in July 1999.

The Wayne County Treasurer, acting as the foreclosing governmental unit (FGU) under the General Property Tax Act, MCL 211.01 et seq, filed a notice of forfeiture of the lot in April 2002. See MCL 211.78g(1).[1] In May 2002, the Treasurer was obliged to conducted a title search to determine holders of interest in the forfeited property. See MCL 211.78i(1). On June 14, 2002, the Treasurer filed a petition for foreclosure of numerous properties in Detroit, including the subject lot. The amount of the delinquent back taxes, plus penalties and interest, on the Church property equaled $967.27. (Order Granting Relief from Judgment, p 2).

MCL 211.78i and MCL 211.78j required the County Treasurer to provide identifiable property interest holders with an administrative show cause hearing to be conducted in County offices in February 2003, preceded by 30-day written notice. MCL 211.78k required the Treasurer to provide property interest holders with a judicial hearing before the circuit court in February 2003, preceded by written 30-day notice.

Wayne County Circuit Court Chief Judge Mary Beth Kelly, who hears all property tax foreclosures actions in Wayne County, entered the judgment of foreclosure on March 10, 2003. The

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[1]The Treasurer was required to have sent three notices of future forfeiture and redemption rights during the months of June, September, and February prior to the March 1 forfeiture. See MCL 211.78b; MCL 211.78c; MCL 211.78f. The record apparently does not reflect whether such notices were given.

judgment of foreclosure included a finding that "all persons entitled to notice and an opportunity to be heard have been provided that notice and opportunity,"an express finding mandated in tax foreclosure judgments by MCL 211.78k(5). The property was not redeemed within the 21-day redemption period allowed by MCL 211.78k(5).

The Wayne County Treasurer sold the Church property to Appellants Matthew Tatarian and Michael Kelly at auction. On November 4, 2003, the Treasurer conveyed a quitclaim deed to the property to Appellants, which was recorded on November 12, 2003.

The Perfecting Church filed a motion for relief from the foreclosure judgment on May 18, 2004. The Church's motion was filed pursuant to MCR 2.612(C)(1)(d)(judgment was void) and (f)(any other reason justifying relief from the operation of the judgment). The Church maintained that it did not receive notice of the tax forfeiture or notice of the Treasurer's administrative hearing of February 2003 and the judicial hearing of February 2003. Its motion was supported by the affidavit of the Church's general manager, Cynthia Flowers. Ms. Flowers averred that the Church received no mailed notice of the Treasurer's forfeiture or subsequent hearings.

The Church's motion was also supported by internal Wayne County correspondence stating that the Treasurer's title search had missed the Church's recorded interest in 17843 Van Dyke. (Memo dated 3/2/2004 from Margaret Meakin to Wayne County Corporation Counsel Cynthia Yun). The Church submitted the County's mail log for parcel 15005397, which showed that the Treasurer provided only certified mail service on Darrel Lambert and Anita Lambert, the Church's vendor, which was returned unclaimed. The County Treasurer apparently conceded that it did not send notice to the Church which owned the property.

On July 7, 2004, Judge Kelly entered an order which vacated the judgment of foreclosure as to the Church and which gave the Church a twenty-one day period in which to redeem the property The order also directed the Treasurer to record a certificate of error with the Wayne County Register of Deeds. In addition, the order cancelled the deed issued by the Treasurer to Matthew Tatarian and Michael Kelly and directed Tatarian and Kelly to execute and deliver a quitclaim deed to the Church.

Matthew Tatarian and Michael Kelly filed a delayed application for leave to appeal to the Michigan Court of Appeals, which was denied for lack of merit in the grounds presented on July 11, 2005.

Appellants filed an application for leave to appeal to the Michigan Supreme Court, which was granted on February 24, 2006. That application did not dispute that the Church's recorded interest was identifiable by the Treasurer under MCL 211.78i(2), that the Treasurer was constitutionally required to provide notice and hearing to the Church, or that the Treasurer did not send notices of the tax foreclosure proceedings to the Church. Rather, the application raised the single issue that Judge Kelly was statutorily divested of jurisdiction to entertain the Church's motion for relief under MCR 2.116(C) and by implication, that the Church had no legal remedy through which it could regain title to its land.

The Supreme Court granted leave in an order issued on February 24, 2006. The Supreme Court's order directed the parties to address the two questions designated herein in the Statement of Questions Presented and invited the filing of amicus briefs. Judge Kelly continued to grant a co-defendant's motion to set aside the foreclosure judgment of March 10, 2003, as recently as May 5, 2006. (Docket Entry No. 2146).

SUMMARY OF ARGUMENT

The touchstone of procedural due process is notice and opportunity to be heard *before* the state deprives a person of a property. Jones v Flowers, 547 US __; 126 S Ct 1708, 1717; 164 L Ed 2d 415 (2006). The United States Supreme Court and this Court have determined that the Due Process Clause mandates that the state provide notice and an opportunity for a hearing *before* it can extinguish a person's property interest in an rem property tax foreclosure. Jones v Flowers, 126 S Ct 1717; Mennonite Board of Missions v Adams, 462 US 791; 103 S Ct 2706; 77 L Ed 2d 180 (1983); Dow v Michigan, 396 Mich 192, 205; 240 NW2d 450 (1976). Therefore, notice and hearing provided only *after* the state has permanently deprived an owner of its title to land for back taxes, and that cannot result in restoration of title of the land to the owner, is not constitutionally meaningful. Dow v Michigan, 396 Mich 192, 206, n 21. It is, in fact, constitutionally meaningless.

Where a foreclosing governmental unit (FGU) has failed to provide a property owner with notice and hearing that is a minimum constitutional *precondition* to the final termination of the owner's property interest in the tax delinquent land, the state's provision of a post-deprivation hearing and an award of damages in the Court of Claims is constitutionally meaningless since the property owner can't thereby prevent or reverse the complete loss of interest in the land. The owner cannot constitutionally be limited to obtaining damages in the Court of Claims after the fact of the FGU's due process violation because damages are not a substitute for a pre-deprivation notice and hearing which could have prevented transfer of title to the FGU in the first place. The prohibition of the Fourteenth Amendment that "no State shall...deprive any person of life, liberty, or property, without due process of law" bars the extinguishment of the owner's title until the FGU

has provided the required notice and hearing at a time at which the owner can still prevent loss of title. The circuit court below properly determined that under circumstances presented, the Appellee Church was entitled to have the constitutionally invalid foreclosure judgment vacated and to notice and hearing anew with the opportunity to redeem.

ARGUMENT

I. THE LEGISLATURE CANNOT, IN THE INTEREST OF FINALITY OF TAX FORECLOSURE TITLES, PERMANENTLY EXTINGUISH REAL PROPERTY INTERESTS WHERE THE STATE HAD NOT PROVIDED THE OWNERS WITH MINIMAL CONSTITUTIONAL NOTICE AND HEARING, AND CANNOT CONSTITUTIONALLY SUBSTITUTE A DAMAGES REMEDY FOR NOTICE AND AN OPPORTUNITY TO PRESERVE OR REGAIN TITLE; BY NECESSITY, TRIAL COURTS MUST BE EMPOWERED TO GRANT RELIEF FROM A FORECLOSURE JUDGMENT WHERE DUE PROCESS WAS DENIED.

If MCL 211.78l is construed as barring a property owner, who was not provided by an FGU with minimal constitutional notice of the FGU's foreclosure hearing or with an opportunity to defend, from regaining his property through petition to the circuit court and is construed as limiting that property owner to a damages remedy against the FGU in the Court of Claims, then MCL 211.78l deprives that owner of his property without due process.

A. The Federal and State Due Process Clauses Require A Tax Foreclosing Entity To Provide An Owner Of A Substantial Property Interest With Notice And Hearing Before Terminating The Owner's Interest In The Tax Delinquent Land.

Forty-five years ago, the United States Supreme Court described the central tenant of procedural due process as follows: "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" Fuentes v Shevin, 407 US 67, 80; 92 S Ct 1983; 32 L Ed 2d 556 (1972), citing Baldwin v Hale, 68 US 531, 534; 1 Wall 223, 233; 17 L Ed 650 (1864). The purpose of the right to be heard is to protect a party's use and possession of

property from arbitrary encroachment-to minimize unfair or mistaken deprivations of property. Fuentes, 407 US 81.

Hence, the elementary and fundamental requirement of the Fourteenth Amendment Due Process Clause is notice and the opportunity to be heard at a meaningful time and in a meaningful manner. Armstrong v Manzo, 380 US 545, 552; 85 S Ct 1187; 14 L Ed 62 (1965); Breath v Crovich, 729 F2d 1006, 1019 (CA 5, 1984), citing Mathews v Eldridge, 424 US 319, 333; 96 S Ct 893; 47 L Ed 2d 18 (1976); Dow v Michigan, 396 Mich 192, 205; 240 NW2d 450 (1976). The Supreme Court made it clear that "due process requires an opportunity for a hearing *before* a deprivation of property takes effect." Fuentes v Shevin, 407 US 67, 88 (emphasis supplied). See also Dow v Michigan, 396 Mich 206; Brandon Twp v Tomkow, 211 Mich 275, 282; 535 NW2d 268 (1995). In the seminal case of Mullane v Central Hanover Bank & Trust Co, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950), the United States Supreme Court "recognized that *prior to* an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide 'notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Emphasis supplied).

"If the right to notice and a hearing is to serve its full purpose, it is clear that it must be granted at a time when the deprivation can still be *prevented.*" Fuentes, 407 US 81 (Emphasis supplied). Fuentes made clear that notice and hearing after the deprivation are inadequate:

> At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not...embraced the general proposition

> that a wrong may be done if it can be undone." Stanley v Illinois, 405 US 645, 647 [;925 S Ct 1208; 31 L Ed 2d 551] (1972).

In Dow v Michigan, 396 Mich 205, this Court acknowledged that while the form and nature of the of the hearing can vary, "the Due Process Clause secures an absolute right" to an opportunity for a "meaningful hearing *before the termination becomes effective,*" citing Bell v Burson, 402 US 535, 542; 91 S Ct 1586; 29 L Ed 2d 90 (1971)(Emphasis supplied). While "the relative weight of the affected property interest is relevant ... to the form of notice and hearing required by due process, ...[s]ome form of notice and hearing -formal or informal- is required before deprivation of a property interest that 'cannot be characterized as de minimus.'" Fuentes, citing Sniadach v Family Finance Co., 395 US 337, 89 S Ct 1820; 23 L Ed 2d 349 (1969). See also Cleveland Board of Education v Loudermill, 470 US 532, 542; 105 S Ct 1487; 84 L Ed 2d 494 (1985)(acknowledging that "'The root requirement" of the Due Process Clause is "that and individual be given an opportunity for a hearing *before* he is deprived of any significant protected interest.'")(Emphasis in original).

Michigan courts have acknowledged that both the due process clauses of the United States and Michigan constitution, Const 1963, art 1, § 17 , "require that one be given notice and afforded an opportunity *before* being deprived of a property interest." Wayne County Treasurer v Westhaven Manor Limited Dividend Housing Association, 265 Mich App 285; 698 NW2d 879 (2005), lv den 474 Mich 862 (2005)(emphasis supplied); Brandon Twp v Tomkow, 211 Mich App 275, 282.

Prederivation notice and hearing cannot be excused in a tax foreclosure proceeding because it is not among the few extraordinary circumstances where a postdeprivation notice and hearing withstand constitutional scrutiny. The Supreme Court acknowledged in Fuentes that an "extraordinary situation" may exist that justifies postponing notice and opportunity for a hearing

prior to the deprivation of property by the state. Fuentes, 407 US 90-92. It acknowledged that only in a "few limited situations" of a truly unusual nature requiring the immediate state seizure of property could the due process clause tolerate postponing of notice and a hearing. The Court designated those extraordinary circumstances as removing misbranded drugs and contaminated food, protecting against economic disaster of bank failures, and collecting the internal revenue of the United States in times of war. Fuentes, 407 US 91-92, citing Bowles v Willingham, 321 US 503, 519-21; 64 S Ct 641; 88 L Ed 892 (1944).

The Supreme Court has also recognized that in limited circumstances where it is impossible for the state to provide predeprivation notice and hearing, a statutory postdeprivation hearing may satisfy due process. Zinermon v Burch, 494 US 113; 110 S Ct 975, 108 L Ed 2d 100 (1990), citing inter alia, Logan v Zimmerman Brush Co, 455 US 422, 436; 102 S Ct 1137; 71 L Ed 2d 250(1982). In Zinermon, the Supreme Court stated that "the necessity of quick action by the State or the impracticality of providing any predeprivation process" may mean that a postdeprivation hearing is constitutionally adequate, quoting Parratt v Taylor, 451 US 527, 539; 101 S Ct 1908; 68 L Ed 2d 420 (1981); and Memphis Light, Gas & Water Div v Craft, 436 US 1, 19; 98 S Ct 1554; 56 L Ed 2d 30 (1978)("Where the potential length or severity of the deprivation [of property] does not indicate a likelihood of serious loss and where the procedures...are sufficiently reliable to minimize the risk of erroneous determination," a prior hearing may not be required" but holding that a prior informal hearing was required before a city utility could terminate water service). In Parratt and Hudson v Palmer, 468 US 517; 104 S Ct 3194; 82 L Ed 2d 393 (1984), the Court had held that "where the state cannot predict and guard in advance against a deprivation, a postdeprivation tort remedy is all the process the State can be expected to provide and is constitutionally sufficient." Zinermon , 494 US

115. See also Hughlett v Romer-Sensky, ___ F3d ___(CA 6, 2006)(citing Hudson, 468 US 531, as instructing that a postdeprivation procedure may remedy "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process.").

The state does predict and can guard against the termination or deprivation of real property interests through its own tax foreclosure proceedings. Therefore, postdeprivation notice and hearing to owners of property interests can never satisfy due process. In Mennonite Board of Missions v Adams, 462 US 791, 798; 103 S Ct 2706; 77 L Ed 2d 180 (1983), the Supreme Court clarified what process was due to an owner whose property interest was being foreclosed upon for real property tax delinquency in an in rem proceeding. Significantly, Mennonite made it clear that notice must be afforded *before* the property owner interest is terminated by the state: "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional *precondition* to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." 462 US . (emphasis supplied). See also Dow v Michigan, 396 Mich 206-207; Brandon Twp v Tomkow, 211 Mich App 275, 282; 535 NW2d 268 (1995).

Mennonite concluded that the holder of a "substantial property interest that is significantly affected by a tax sale of real property is "entitled to notice reasonably calculated to apprise him of a pending tax sale" of the real property. Mennonite, 462 US 796-797, n 3, rejected the view that because the tax foreclosure was an in rem proceeding, the state need only provide constructive notice to interested parties:

> The decision in Mullane rejected one of the premises underlying this Court's previous decisions concerning the requirements of notice in judicial proceedings: that due process rights may vary depending on whether actions are in rem or in personam.

> 339 US, at 312; 70 S Ct 652; 94 L Ed 865. See Shaffer v Heitner, 433 US 186, 206; 97 S Ct 2569; 53 L Ed 2d 683 (1977)....
>
> > Beginning with Mullane, this Court has recognized, contrary to the earlier line of cases, that "an adverse judgment in rem directly affects the property owner by divesting him of his rights in the property before the court." Shaffer v Heitner, supra, at 206 [cite omitted]... Our cases have required the State to make efforts to provide actual notice to all interested parties comparable to the efforts that were previously required only in in personam actions.

See also Dow, 396 Mich 192, 200, n 15(stating that the requirements of the Due Process Clause do not depend on the classification of a suit as in rem or in personam).

As to the manner of notice, Mennonite determined that if a mortgagee of property subject to a tax sale is "identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service." 462 US 798. It stated that "unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of Mullane." 462 US 798. It concluded that "neither notice by publication and posting, nor mailed notice" to the mortgagor were means "such as one desirous of actually informing the mortgagee might reasonably adopt to accomplish it." 462 US 798.

The fundamental principle that the state must afford an owner notice and hearing prior to the termination of his property interest in a tax foreclosure was reiterated by the Supreme Court yet again in the recent case of Jones v Flowers, 547 US __; 126 S Ct 1708, 1712; 164 L Ed 2d 415 (2006). In Jones, 126 S Ct 1712, the Supreme Court reiterated that "*[b]efore* a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner "notice and opportunity for hearing appropriate to the nature of the case." citing Mullane, 339 US 306 (Emphasis supplied).

The Due Process Clause does not require that the interested property owner actually receive[2] the minimal notice of tax foreclosure hearing provided by the state. Jones, 126 S Ct 1713; Dusenberry v United States, 534 US 161; 170-171; 122 S Ct 694; 151 L Ed 2d 597 (2002). Rather, it requires the "government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objection." Jones, 126 S Ct 1713-1714, citing Mullane, 339 US 314. See also Dow, 396 Mich 211(stating that "if the state exerts reasonable efforts, then failure to effectuate actual notice would not preclude foreclosure of the statutory lien and indefeasible vesting of title on expiration of the redemption period.")

In Jones, the Supreme Court evaluated "the adequacy of notice prior to the state extinguishing a property owner's interest in a home" through tax foreclosure. Jones, 126 S Ct 1715. Both the facts in Jones and timing of the successful due process challenge made after the state's sale of the property to a third party, are instructive to the case at bar.

The Arkansas Commissioner of State Lands had mailed a certified letter to Mr. Jones at an address from which Mr. Jones had moved but was occupied by his daughter and ex-wife. The letter advised of the tax delinquency and of the right to redeem the property prior to a public tax sale two years hence. The post office promptly returned the unopened mail to the Commissioner marked "unclaimed." Two years later, the Commissioner published a notice of the tax sale in the newspaper several weeks before the actual sale date. The state received no bid at the sale but negotiated a sale

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[2]In Dusenberry, 534 US 170, the Court noted that the term "actual notice" is ambiguous, as it has been used to distinguish notice by mail from notice by publication and also to refer to the actual receipt of notice by the intended recipient. The Court in Dusenberry equated "actual notice" with "receipt of notice."

of the property to Ms. Flowers several months later. The state sent another certified letter to Mr. Jones at the previously used address, which was also returned to the state as unclaimed. Ms. Flowers then had an unlawful detainer notice delivered to the property, which was served on Mr. Jones' daughter. Mr. Jones was notified of the tax sale by his daughter. Mr. Jones then filed a new lawsuit in state court which alleged that the state failed to provide constitutionally adequate notice of the tax sale and of his right to redeem the property. The Arkansas Supreme Court affirmed the grant of summary judgment for the state, finding that the state's attempt to provide notice by certified mail satisfied due process in the circumstances presented. Jones, 126 S Ct 425.

The Supreme Court reversed, holding that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." It reasoned that taking no further action after the return of the certified letter "is not what someone desirous of actually informing Mr. Jones " of the "irreversible prospect" of the loss of a house" would do. The Court required the state to take additional followup steps, depending on what new information the state gained, such as sending the notice by regular mail, posting the notices on the front door, or sending notice to the occupant. 126 S Ct 1718-1720. It did not deem the newspaper publication of notice as constitutionally adequate under the circumstances as it was possible and practicable to give Mr. Jones more adequate warning of the impending tax sale. 126 S Ct 1720. The Court did not impose an obligation to conduct an open-ended search for a new address. 126 S Ct 1719-1720. In sum, the Supreme Court in Jones reaffirmed that a tax foreclosure should be voided, and the state's sale of the property to a third party nullified, by a collateral suit initiated by the property owner, where the state failed to provide adequate predeprivation notice and hearing to the owner.

B. If The Foreclosing Entity Has Not Provided An Owner With Notice And Hearing Required By Due Process, Then The Owner Must Be Restored To The Position He Would Have Occupied Had Due Process Of Law Been Accorded To Him In The First Place.

As a rule, the constitutional invalidity that results from the state's failure to give predeprivation notice of a permanent loss of an interest and hearing to a person cannot be cured by a hearing subsequently obtained by the person to set aside the decree that terminates the person's interest. Armstrong, 380 US 549, 551. Rather, the decree itself must be vacated and the state's action considered anew. In Armstrong, the Supreme Court considered the issues of whether the undisputed failure to provide notice of judicial hearings that would have terminated the parental rights of a natural father and approved the adoption of his child by the child's stepfather, violated the father's due process rights and, more importantly, whether the subsequent hearing on the divorced father's motion to vacate or annul the judgment "served to cure its constitutional invalidity." The Court concluded that the father's due process rights had been violated because he was not provided with notice of hearings at a meaningful time. It ruled that the constitutionally invalid judgment could not stand, despite the hearing on the father's postjudgment motion to vacate, and that the proceedings to terminate parental rights had to begin anew:

> The Texas Court of Civil Appeals...held...that whatever constitutional infirmity resulted from the failure to give the petitioner notice had been cured by the hearing subsequently afforded to him upon his motion to set aside the decree. ...We cannot agree.
>
> Had the petitioner been given the timely notice which the Constitution requires, [the mother and stepfather], as the moving parties, would have had the burden of proving their case as against whatever defenses the petitioner [the natural father] might have interposed....

> Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding on nonsupport by another judge...Yet these burdens would not have been imposed on him had he been given timely notice in accord with the Constitution.
>
> A fundamental requirement of due process is the opportunity to be heard [cite omitted]. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. *The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.* 380 US 552 (emphasis supplied).

Citing to the rule of Armstrong, this Court, in Dow, 396 Mich 205 206, n 21, declared that for an owner of an significant interest in tax delinquent land, "a hearing would not be 'at a meaningful time' unless the owner of a significant interest had an opportunity to cure any delinquency determined upon the hearing and avoid foreclosure and the taking of his property by the state. Even if a right to redeem were not constitutionally rooted, once granted by statute it is protected by the Due Process Clause."

When faced with a property owner who had not been provided with predeprivation notice and hearing of a property tax foreclosure as required by due process, Michigan courts have consistently recognized, even in subsequent collateral proceedings such as quiet title actions and condemnation actions, that the Constitution required the property owner be given a meaningful opportunity to regain his interest in the land. See Dow, 396 Mich 206; Ross v Michigan, 255 Mich App 51, 58; 662 NW2d 36 (2003)(holding in quiet title action that where state failed to provide property owner with the required show cause hearing and right to redeem and subsequently sold property to third party, the owner still retained his right to hearing and to redeem, despite sale to third party, since state can not "circumvent" hearing requirement and redemption rights); Brandon Twp

(state's due process violation raised in quiet title actions); City of Flint v Takacs, 181 Mich App 732, 738; 449 NW2d 699(1989)(state's due process violation raised in condemnation action). The Court of Appeals in Wayne Co Treasurer v Westhaven Manor Ltd Dividend Housing Ass'n, 265 Mich App 295[3], recognized that where the Wayne County Treasurer, as the FGU, violated the rudimentary demands of due process, i.e., failing to provide notice of tax foreclosure, an opportunity for the very same show cause and judicial hearings of February 2003 as are at issue in this case, and for redemption, the Due Process Clause prohibited the state from forcing on the owner who suffered the due process violation, the exclusive redress of bringing a money damages action against the FGU.

In the very recent case of Conseco Finance Servicing Corp v Missouri Dept of Revenue, 2006 Mo Lexis 74 (June 13, 2006), the Supreme Court of Missouri reaffirmed that postdeprivation notice and hearing cannot "wipe the slate clean" where the state had permanently deprived a mobile home owner of the mobile home without minimal predeprivation notice and hearing. There the Missouri Supreme Court evaluated Missouri's statutory scheme for the state's issuance of new titles to abandoned manufactured homes to a landlord under the Jones standard. It ruled that the state's single mailing of notice of the homes' status of abandonment and potential transfer of title, to the address known to be abandoned, did not satisfy the DueProcess clause under Jones. Further, the

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[3]The Court majority opined that MCL 211.78l(2), as amended by 2001 PA 101, would not be constitutional as interpreted by concurring Judge Brian Zahra:

> If the minority's interpretation were adopted, the owner of the extinguished property interest, regardless of the circumstances under which his interest was extinguished, would be limited to a cause of action in the Court of Claims for monetary damages for the notice deficiency. We simply cannot agree with such an interpretation that would deprive an interested party of its property interest without being afforded due process. Such a reading renders the statute unconstitutional. 265 Mich App 295.

Missouri Supreme Court invalidated the statute because it did not provide the home owner with a pre-deprivation hearing at which he could contest the amount of rent owed the landlord and the allegations of abandonment. Significantly, it rejected the state's argument that a post-deprivation remedy in the form of injunctive relief satisfied due process. Citing Fuentes, 407 US 81-82, the Conseco court ruled that "it long has been recognized that the mere right to seek a post-deprivation hearing or to obtain damages after the fact for a wrongful [deprivation] of property does not satisfy due process." It concluded that the home owners were entitled to a hearing "before their property interests were disturbed" and "[w]ithout a predeprivation hearing, they were not given an opportunity to be heard at a meaningful time and in a meaningful manner." It noted that the state did not offer any extraordinary circumstance justifying dispensing with the pre-deprivation notice and hearing required by the Due Process clause.

C. Appellants Construe MCL 211.78l, 1999 PA 203, In An Unconstitutional Manner That Permits The State To Permanently Terminate An Owner's Interests In Real Property Without Having First Afforded The Owner Notice And An opportunity To Cure Any Delinquency Determined At A Predeprivation Hearing And To Avoid Foreclosure.

MCL 211.78l, 1999 PA 203, is not necessarily facially unconstitutional. Conceivably, it may be read to only provide a remedy where the FGU did send constitutionally adequate notice of the judicial hearing, but the owner maintains that he did not receive any notice required by the GPTA.

The language of MCL 211.78l focuses on an owner's *receipt* of notice, and suggests that the Legislature was addressing the circumstance where interests were extinguished after constitutionally adequate notice and hearing had been provided by the FGU but notice had nevertheless not been received. MCL 211.78l provides:

> If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.
>
> The court of claims has original and exclusive jurisdiction in any action to recover monetary damages under this section. (Emphasis supplied).

The provisions of section 78k referenced in section 78l, are as follows:

> (5) The circuit court shall enter final judgment on a petition for foreclosure filed under section 78h at any time after the hearing under this section but not later than the March 30 immediately succeeding the hearing with the judgment effective on the March 31 immediately succeeding the hearing...The circuit court's judgment shall specify all of the following:....
>
> (6) Except as otherwise provided in subsection (5)(c) and (e), fee simple title to property set forth in a petition for foreclosure filed under section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section...shall vest absolutely in the foreclosing governmental unit and the foreclosing governmental unit shall have absolute title to the property. The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and shall not be stayed or held invalid except as provided in subsection (7) or (9).

Hence, the statutory precondition to the extinguishment of "all unrecorded and unrecorded interests in a parcel of property.. as provided in section 78k" is the providing of notice and an opportunity to be heard by the FGU. In short, the Legislature may have intended to grant monetary relief where the FGU had satisfied the Constitution but not the GPTA.

Although MCL 211.78l may be facially constitutional, the Appellants' construction of MCL 211.78l, 1999 PA 123, is not. Their construction of MCL 211.78l, like the construction urged by amicus Michigan Department of Treasury, does not comport with the dictate of Mennonite, Jones,

and Dow that the state must provide notice and a hearing *before* it permanently and totally deprives the owner of his property interest through tax foreclosure. The trial court properly rejected the Appellants' construction of MCL 211.78l, which would authorize a property owner to be permanently deprived of his land without provision of prior notice and a prior hearing. The due process clause cannot tolerate the state's final stripping of title to land for delinquent taxes without giving the property owner a hearing in time to stop the final divestment of title. Dow, 396 Mich 206, n 21. A post-deprivation hearing at which the owner cannot stop or prevent the final loss of his land for delinquent taxes is meaningless under the Due Process Clause.

D. The Legislative Scheme Of 2003 PA 263 Wherein A Judgment Of Foreclosure That Deprived A Property Owner Of His Interest In Land Without Constitutionally Adequate Notice And Hearing Cannot Later Be Set Aside Or Invalidated, Violates The Due Process Clause.

The Wayne County Treasurer correctly states that prior to the amendment of MCL 211.78l, in 2003 PA 263, nothing in the language of MCL 211.78l prohibited the circuit court which had entered a judgment of foreclosure from vacating the judgment under MCR 2.612(C). (Wayne County Treasurer's Brief on Appeal, pp 11-12). See Wayne County Treasurer v Westhaven Manor Limited Dividend Housing, 265 Mich App 30; State Treasurer v Riley, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 20, 2006 (Docket No. 258105). He also states correctly that as amended in 2003 PA 263, MCL 211.78k(5), in tandem with MCL 211.78l, bars the circuit court from granting relief from a judgment of tax foreclosure pursuant to MCR 2.612 (C). However, the two sections together do much more that prevent the vacation of a foreclosure judgment by the circuit court under MCR 2.612; they also prohibit the circuit court from "invalidating" a judgment

of foreclosure in new or collateral lawsuits such as the quiet title actions in Dow 396 Mich 210,[4] and Brandon Twp. The express language of MCL 211.78k(5) provides that " a judgment entered under this section...shall not be held invalid after the March 31 immediately succeeding the entry of a judgment."

With the enactment of 2003 PA 263, the Legislature created a statutory scheme wherein the state can permanently and totally divest a person of his interest in land for back taxes without having afforded that person with a constitutionally meaningful hearing at which he could avoid foreclosure and keep his land. The Due Process Clause prohibits such a scheme. Dow, 396 Mich 206, n 21, Wayne County Treasurer v Westhaven Manor Limited Dividend Housing Association, 265 Mich App 295. The Legislature is barred from this scheme regardless of its willingness to have local treasuries pay monetary damages for having inflicted the due process violation on the property owner.

Amicus Michigan Department of Treasury suggests that the Legislature's expressed goal of insuring that FGUs acquire "good and marketable fee simple title" justifies limiting the remedy for a foreclosure without due process to the damages remedy in the Court of Claims. (Brief for Amicus Michigan Department of Treasury, p 11). However, the Legislature's laudable goal of expediting insurable title can never supercede the prohibition of the Due Process Clause. As this Court explained in Dow, 396 Mich 210, "[t]he state has no proper interest in taking a person's property

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[4] In Dow v Michigan, 396 Mich 210, the remedy granted by Supreme Court to the land contract vendee who sustained a procedural due process violation of being given no predeprivation notice and hearing before the state took a tax foreclosure judgment, was a judgment quieting title in the land contract vendee.

for nonpayment of taxes without proper notice and opportunity for a hearing at which the person can contest the state's right to foreclose and cure any default determined." The United States Supreme Court in Jones rejected a similar statutory goal of finality of tax titles transfers posited by the amicus United States Solicitor General as justification for dispensing with additional notice when certified mail notice of tax foreclosure is returned as unclaimed. (Brief for United States as Amicus Curiae Supporting Respondents, p 7).

RELIEF REQUESTED

Wherefore the Amicus City of Detroit requests this Honorable Court to affirm the July 7, 2004, order of the Wayne County Circuit Court which granted the Appellee Church's motion for relief from judgment of tax foreclosure dated March 10, 2003, and to rule that MCL 211.78l and MCL 211.78 k(5)(g) are unconstitutional because they permit a person to be deprived of property without being afforded due process of law.

Respectfully submitted,

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DATED: August 18, 2006

STATE OF MICHIGAN

COURT OF APPEALS

STATE TREASURER,

Petitioner-Appellee,

v

GERALD RILEY,

Respondent-Appellant,

and

TOMMY HARMON,

Intervening Respondent-Appellee,

and

LOUIS ROSSIGNUOLO,

Respondent.

UNPUBLISHED
June 20, 2006

No. 258105
St. Joseph Circuit Court
LC No. 01-000701-CZ

Before: Meter, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this property foreclosure action, respondent Gerald Riley ("respondent") appeals by leave granted from an order denying his motion for relief from a judgment of foreclosure, and granting intervening respondent Harmon's motion to release the notice of lis pendens respondent filed against the subject property. Respondent claims that he did not receive sufficient notice of the right to redeem his property. We affirm.

Pursuant to the General Property Tax Act (GPTA), MCL 211.1 *et seq.*, as amended by 1999 PA 123,[1] the state treasurer initiated foreclosure proceedings for unpaid taxes, interest,

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[1] Citations to the GPTA and to individual statutory sections contained within the GPTA refer to the statutes in effect at the time the petition was filed, June 18, 2001.

penalties and fees against four parcels respondent owned. Notices of the proceedings were sent to respondent at three different addresses, but the notices were returned as "unclaimed." Respondent concedes that he did, however, learn of the foreclosure proceedings by publication in the Three Rivers Commercial-News on December 28, 2001, January 4, 2002, and January 11, 2002, which gave notice of a judicial foreclosure hearing to be held on February 19, 2002. The notices also included the following warning:

> If you are a person with an interest in property being foreclosed:
>
> - You have the **right to redeem** this parcel from the foreclosure process by **payment** of all forfeited unpaid taxes, interest, penalties, and fees prior to the expiration of the redemption period. **You should contact the Saint Joseph County Treasurer for the amount required to redeem.**
>
> - You may lose your interest in the property as a result of the foreclosure proceeding.
>
> - The title to the property shall vest absolutely in the Foreclosing Governmental Unit unless all forfeited unpaid delinquent taxes, interest, penalties, and fees are paid within 21 days after judgment is entered in the foreclosure proceedings.

Respondent appeared at the hearing on February 19, 2002, and objected to the foreclosure of the parcels at issue. The trial court scheduled an evidentiary hearing on respondent's objections for March 25, 2002. At the evidentiary hearing, the court took testimony and heard argument on respondent's objections. Although respondent has not provided a transcript of the March 25 hearing, the trial court's subsequent April 3, 2002 opinion and order granting foreclosure states the gist of respondent's objections. The essence of respondent's claim was that he was improperly denied a homestead exemption and that the parcels were therefore assessed too high. The trial court denied the objections because respondent's claim did not come within the limited grounds for relief under MCL 211.78k(2). The court mailed the judgment to respondent at two different addresses, neither of which matched the address respondent gave to petitioner's counsel, and the post office returned both envelopes as undeliverable.

Respondent took no action during the twenty-one day redemption period, so petitioner sold the parcels at auction. Intervenor respondent Tommy Harmon purchased one of the parcels. Thereafter, respondent tried, unsuccessfully, to redeem his properties. Respondent moved for postjudgment relief from the judgment of foreclosure on the grounds that he did not receive notice of the judgment. The trial court denied the motion on the basis that the GPTA did not provide jurisdiction to grant postjudgment relief. The court also granted Harmon the right to intervene and declared the notice of lis pendens respondent filed against Harmon's parcel null and void.

Respondent contends that the trial court erred when it concluded as a matter of law that it had no jurisdiction to modify or grant relief from the judgment of foreclosure. We agree. "Whether a court has subject-matter jurisdiction is a question of law subject to review de novo." *Davis v Dep't of Corrections,* 251 Mich App 372, 374; 651 NW2d 486 (2002).

This Court has stated that the notice provisions contained in the GPTA "are designed to insure that those with an interest in the subject property are aware of the foreclosure proceedings so that they make take advantage of their redemption rights;" therefore, any proceeding conducted under the GPTA without due process is invalid. *In re Petition by Wayne Co Treasurer,* 265 Mich App 285, 292-293; 698 NW2d 879 (2005). This Court rejected the argument that a landowner's only remedy was an action for money damages under MCL 211.781 because "such an interpretation . . . would deprive an interested party of its property without being afforded due process" and "[s]uch a reading renders the statute unconstitutional." *Id.* at 295, citing *Dow v Michigan,* 396 Mich 192, 205-206; 240 NW2d 450 (1976) and *Ross v Michigan,* 255 Mich App 51, 56; 662 NW2d 36 (2003). Thus, this Court held that

> on a postjudgment motion in which the moving party alleges and proves a deprivation of its due process rights rendering a timely appeal to this Court impossible, the circuit court retains jurisdiction under MCR 2.612(C) to modify or vacate the foreclosing judgment it entered on the basis of an invalid proceeding. [*In re Petition by Wayne Co Treasurer, supra* at 300.]

Respondent further contends that his due process rights were violated; consequently, he is entitled to relief under MCR 2.612(C). Because the trial court erroneously concluded it had no jurisdiction, it did not address this issue. But the record is sufficient for this Court to determine that respondent's claim fails as a matter of law. "[W]hether constitutional due process applies and, if so, has been satisfied are legal questions reviewed de novo." *Reed v Reed,* 265 Mich App 131, 157; 693 NW2d 825 (2005).

Both the Michigan Constitution and the United States Constitution preclude the government from depriving a person of property without due process of law. *Reed, supra* at 159. Under the Due Process Clause of the Fourteenth Amendment, states must afford individuals whose property interests are at stake notice and an opportunity to be heard. *Dusenbery v United States,* 534 US 161, 167; 122 S Ct 694; 151 L Ed 2d 597 (2002). The required notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v Central Hanover Bank & Trust Co,* 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950). Process satisfies constitutional standards when "there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker." *Reed, supra* at 159.

Here, respondent was accorded due process. He had actual notice of the initial foreclosure hearing. He was permitted to state his objections. And, he had a meaningful opportunity for a hearing on his objections before an impartial decision maker. His due process claim is factually premised on his failure to receive a copy of the judgment of foreclosure and legally premised on his claim that an essential element of due process is the right to appeal. Respondent, however, argues that the failure to receive the judgment within 21 days deprived him of his right to appeal or redeem the property with that time frame.

Respondent's argument fails. First, respondent had actual notice that "title to the property shall vest absolutely in the Foreclosing Governmental Unit unless all forfeited unpaid delinquent taxes, interest, penalties, and fees are paid within 21 days after judgment is entered in

the foreclosure proceedings." Second, respondent fails to cite any authority that requires the trial court to notify persons filing objections to foreclosure of the entry of its judgment. Had respondent reviewed the statute, he would have discovered that the trial court was *required* to "enter judgment on a petition for foreclosure . . . not more than 10 days . . . after the conclusion of the hearing [in] contested cases." MCL 211.78k(5).

Moreover, according to respondent, he provided the attorney for petitioner, State Treasurer, his "correct address" after the February 19, 2002 hearing. Relying on MCR 2.602(D)(1), respondent appears to argue that petitioner had the "responsibility" to serve the opinion and judgment upon him at the address that he provided after the hearing.[2]

MCR 2.602(D)(1) provides:

> The party securing the signing of the judgment or order shall serve a copy, within 7 days after it has been signed, on all other parties, and file proof of service with the court clerk.

Respondent makes no effort to establish how or under what circumstances petitioner secured the signing of the judgment in this case. To the contrary, the trial court, on its own initiative, generated the opinion and judgment, and mailed them to the parties. Under these circumstances MCR 2.602(D)(1) clearly does not apply, and, consequently, respondent's claim of a due process violation in this respect is also without merit.

Respondent also contends that the trial court erred in granting Harmon the right to intervene in this case. We disagree. This Court reviews a trial court's decision on a motion to intervene for an abuse of discretion. *Vestevich v West Bloomfield Twp,* 245 Mich App 759, 761; 630 NW2d 646 (2001).

A person seeking to intervene must move the court, state the grounds for intervention and attach a pleading setting forth the claim or defense for which intervention is sought. MCR 2.209(C). Here, Harmon failed to file a motion to intervene. Rather, Harmon filed a "Motion to Release Lis Pendens and Recover Costs," but in his prayer for relief, requested that the court allow him to intervene. Petitioner initiated these proceedings against certain parcels of property for which taxes remained unpaid. By statute, the owner or any person with a property interest in the property to be forfeited had a right to appear and show cause why absolute title to that property should not vest in the foreclosing governmental unit. MCL 211.78j. When respondent filed his motion for relief from the judgment of foreclosure, Harmon had already acquired an interest in one of the subject properties. Without his intervention that interest was not otherwise adequately represented and, as a practical matter, could have been impaired or impeded. MCR 2.209(A). So, despite any procedural irregularities, we conclude that under the circumstances

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[2] Respondent makes no argument that the trial court had his correct address or made a mistake in mailing the opinion and judgment. He only faults petitioner.

the trial court did not abuse its discretion by permitting Harmon to intervene. To conclude otherwise would be putting "form over substance."

We affirm.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Jane E. Markey